European Business Organization Law Review 14: 147-173

doi:10.1017/S1566752912001115

The Vacuous Concept of Shareholder Voting Rights

Daniel Attenborough*

Abstract
The shareholder empowerment debate in corporate law is premised upon a reoccurring assumption that, historically, there has been an erosion of shareholder rights. This article contends that this premise is inaccurate and that shareholder rights have remained fundamentally constant. It goes on to argue that a more promising approach to the existing understanding of rights in the shareholder empowerment debate may be found in the broader legal rights literature. In analysing shareholder rights through this lens it is contended that, while there has not been an appreciable abrogation of shareholder rights, it is in the nature of legal rights per se to contain power whilst simultaneously reinforcing the institutions and structures from where those rights emanate.

Keywords: company law, corporate governance, shareholders, rights theory.

1. INTRODUCTION

An increasingly pivotal and divisive subject of legal enquiry in corporate governance concerns the question of how to apportion decision-making power between

* Lecturer in Law, University of Leicester. The author wishes to thank participants in the Society of Legal Scholars Conference, University of Bristol, September 2012. This article has also benefited from the insightful observations of the anonymous reviewer. Particular thanks are owed to Andrew Keay, Paul O'Connell and Lorraine Talbot for extremely helpful comments and suggestions on earlier drafts of this article. The usual disclaimers apply.

directors and shareholders in large public corporations. One recent high-profile aspect of these intellectual efforts can be found in a 2006 special edition of the *Harvard Law Review*.[1] Lucian Bebchuk pressed for an expanded role for shareholder voting rights in corporate governance as a formal legal remedial mechanism to control managers' decision-making power, while Stephen Bainbridge rebuked the apparent negative impact shareholder empowerment might have on the efficiency of such centralised decision-making structures in public corporations. Central to this latter understanding is the view that giving shareholders more authority will lead to worse managerial decision-making because shareholders are typically uninformed, or worse, irrational. This approach expresses a preference for empowering centralised management to make and pursue business decisions through diverse means, subject to minimal important constraints. At the policy-making level, as a corollary of this intransient issue, the question of whether shareholders should be afforded stronger powers as a check on managerial control has also been a major theme in US[2] and European[3] regulatory responses to the global financial crisis, and, in and of itself, has generated an entire specialised thread of scholarship. Clearly, then, the dynamics and interests of shareholders as stewards of the wider public interest in the case of systemic institutions is a highly complex issue.

This article joins this dialogue on shareholder rights with a different voice. Despite the pre-eminence of this scholarly and policy activity, which mobilises conflicting intellectual and political aspirations, the efforts that are currently being

---

[1] L.A. Bebchuk, 'The Case for Increasing Shareholder Power', 118 *Harvard Law Review* (2005) p. 833; L.A. Bebchuk, 'Reply: Letting Shareholders Set the Rules', 119 *Harvard Law Review* (2006) p. 1784; S. Bainbridge, 'Director Primacy and Shareholder Disempowerment', 118 *Harvard Law Review* (2006) p. 1735. See also L. Strine, 'Towards a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America', 119 *Harvard Law Review* (2006) p. 1759.

[2] Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (2006). In 2006, shareholder empowerment figured prominently in a well-publicised US law reform agenda presented by the Committee on Capital Markets Regulation. The Committee's Report recommended increased shareholder rights as an alternative regulatory technique to a more stringent rules-based approach. It connected shareholder power to market control, reasoning that enhanced shareholder rights provide accountability and that accountability means lower agency costs, higher market prices and, accordingly, a more competitive equity marketplace.

[3] The European Commission's first Green Paper in June 2010 was on the corporate governance of financial institutions and was followed, in April 2011, by a Green Paper on corporate governance of all European corporations. See European Commission, 'Green Paper. Corporate Governance in Financial Institutions and Remuneration Policies', COM (2010) 284 final; European Commission, 'Green Paper. The EU Corporate Governance Framework', COM (2011) 164 final. These two reports conclude that, in many cases, the lack of effective control mechanisms contributed significantly to excessive risk-taking by directors during the financial crisis. The solution proposed was, unexpectedly, more shareholder empowerment to counter perceived shareholder passivity.

made to establish a standard repertory of institutional responses to the problem of discretion in the relations of managers and shareholders presents, in a reinforcing pattern, a flawed reading of history. To this point, much of the classical legal thought, at least to some measure, shares in common one distinct and important starting-off point. In particular, the academic and practitioner consensus narrative on the subject is unnecessarily constrained by a series of false necessities or suppositions that once effective shareholder participatory rights, due to changes in the law's basic facultative structure, have over the last century been subject to 'direct and indirect erosion or elimination'.[4] This article challenges the epistemology of the entire shareholder empowerment debate. This epistemology treats competitive market pressures as well as market-based incentive and disciplinary mechanisms as shareholder control predicated upon substantive legal rules, and pays insufficient regard to the ideological characteristic of those underlying governance rules. It is submitted instead that there has not been an appreciable erosion of shareholder rights. Rights, it is argued, do cut both ways – serving at some times and under some circumstances to provide a genuinely participatory process for shareholders and at other times to reinforce a power differential that gives preference to corporate management. This ambivalence means that an imbalance of power dynamics, which are inherent in the recurring bargains between investors and the corporation, is not a recent abnormality but can be traced back to the start of early corporations legislation as an inherent corollary of the nature of legal rights and constitutional rights within a capitalist structural form. There has yet to be clear recognition that these internal devices to protect shareholders from managerial discretion have not eroded but remained constant and unchanged – 'crude, imprecise, and fragile'[5] – a view which, by definition, means that no important power-balancing gains for investors can be won in the legal arena. Any discussion of shareholder rights should be clear about this, in order to avoid confusion.

The structure of this article is as follows. Section 2 begins by setting out the substance and parameters of the shareholder empowerment debate. Section 3 sets out the erosion doctrine thesis which is inherent in the dissonance of this dialogue.

---

[4] R.M. Buxbaum, 'The Internal Division of Powers in Corporate Governance', 73 *California Law Review* (1985) p. 1671, at pp. 1678 and 1732. See also R.M. Buxbaum, 'Corporate Legitimacy, Economic Theory, and Legal Doctrine', 45 *Ohio State Law Journal* (1984) p. 515, at pp. 525-542; W. Werner, 'Corporation Law in Search of Its Future', 81 *Columbia Law Review* (1981) p. 1611, at p. 1613, referring to this view as the 'erosion doctrine'; R. Nolan, 'The Continuing Evolution of Shareholder Governance', 65 *Cambridge Law Journal* (2006) p. 92, at p. 96; M. Kahan and E.B. Rock, 'On Improving Shareholder Voting', in J. Armour and J. Payne, eds., *Rationality in Company Law* (Hart 2009), at p. 258.

[5] M. Kahan and E.B. Rock, 'The Hanging Chads of Corporate Voting', 96 *Georgetown Law Journal* (2008) p. 1227, at p. 1279. See also H.G. Manne, 'The "Higher Criticism" of the Modern Corporation', 62 *Columbia Law Review* (1962) p. 399, at p. 408. Henry Manne submits that '[t]he loss of effective democratic control by shareholders, which was documented in the Berle and Means book, had long been a cause for concern'.

Section 4 provides an explanation of the governance structure in UK and US public corporations, being the focus of this article, and discusses how power is typically allocated between directors and shareholders in the corporation. This will outline corporate law issues in broad terms and only to the extent necessary to explain the primary concern in this article: that is, how the scholarship and policy documents problematically embed shareholder participatory rights as an important corporate law norm, and what this means for the nature of large corporations and the extent of shareholder control. It is not the purpose of this article to examine the status of investors,[6] but to focus specifically on the nature and extent of shareholder participatory rights. Section 5 sets forth the article's thesis through a detailed consideration of the rhetoric of rights as an instrument in both law and literature. It argues that shareholders have power, in the broadest sense. But any understanding of the traditional structure that presumes affirmative legal rights confers unwarranted significance on this ideal, while overlooking reality. Finally, some concluding remarks are offered. The main purpose of this article is to consider this familiar question once again and hopefully to suggest a different conceptual framework with which to evaluate the relationship between management and shareholders. By developing this outline and potentially identifying issues for the future, the hope is to recast, even in some small way, the current dialogue on shareholder rights.

2. On the shareholder empowerment question

It is axiomatic that the emergence of large publically held enterprises at the upper levels of all capitalist economies in the late nineteenth century, with their managerial bureaucracy and increasing reliance on external finance from bank loans and equity shares, brought about a degree of separation of ownership from day-to-day control.[7] Crucially, the empirical findings contained within Adolf Berle's and Gardiner Means' classic treatise on the modern corporation,[8] the terms and tenors of

---

[6] This is undertaken very elegantly elsewhere. See, generally, P. Ireland, 'Company Law and the Myth of Shareholder Ownership', 62 *Modern Law Review* (1999) p. 32; R. Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders', 57 *Cambridge Law Journal* (1998) p. 554; R. Sappideen, 'Ownership of the Law Corporation: Why Clothe the Emperor?', 7 *King's College Law Journal* (1996) p. 27.

[7] R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'Corporate Ownership Around the World', 54 *Journal of Finance* (1999) p. 471, at pp. 492-493; M. Faccio and L.H.P. Lang, 'The Ultimate Ownership of Western European Corporations', 65 *Journal of Financial Economics* (2002) p. 365, at pp. 379-380; M. Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital', 14 *Law and Critique* (2003) p. 147, at p. 155.

[8] A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (New Brunswick 1932). This was simply an extension of Berle's earlier studies in the law of corporate finance. See A.A. Berle, *Studies in the Law of Corporation Finance* (Callaghan and Co. 1928). See also Justice Louis D. Brandeis's account, a year later, which forms part of a much-cited

which are by now numbingly familiar, implied that traditional share ownership, with rare exceptions, was becoming so fragmented and dispersed into myriad holdings that it left managers in de facto control of the corporation and diluted the dominance of money-capital.[9] James Hurst observed that surging changes in the economy after 1890 brought pressure for large-scale enterprises run by strong centralised managements.[10] It is generally recognised that the board and management must be given a certain degree of freedom to be successful. Still, whilst the directors (and through them, the managers) are representatives of the shareholders (and sometimes of other constituencies as well) with power and authority to generate value, the central question for corporate law is: can we, in fact, trust them to do what we have empowered them to do? This is the central conundrum for contemporary corporate law. The problem is that empowered managers may not always use their powers and their position to benefit the corporation and to enhance value. Rather, they may use those powers and authority to maximise their own welfare instead of that of the shareholders.[11]

---

dissenting opinion in *Liggett Co.* v. *Lee* (1933) 288 U.S. 517, 541, 565: 'The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of … thousands of employees and the property of … thousands of investors are subjected, through the corporate mechanism, to the control of a few men.' On the commonalities with the UK, see La Porta, et al., *supra* n. 7, at pp. 491-498; R. La Porta, 'Law and Finance', 106 *Journal of Political Economy* (1998) p. 1113, at p. 1147. Some argue that the separation of ownership and control has never materialised due to the operation of competitive product, capital and managerial-labour markets, which provide managers with incentives to act in their shareholders' best interests. See generally D. Fischel, 'The Corporate Governance Movement', 35 *Vanderbilt Law Review* (1982) p. 1259, at pp. 1261-1265.

9 B. Cheffins, 'The Trajectory of Corporate Law Scholarship', 63 *Cambridge Law Journal* (2004) p. 456, at p. 482. The author observes that 'the Berle-Means analysis of the widely held company implied that shareholders potentially might be subjected to the untrammelled whims of powerful executives'. See also B. Manning, 'Thinking Straight About Corporate Law Reform', 41 *Law and Contemporary Problems* (1977) p. 3, at p. 15, remarking that 'Berle and Means saw the mass of shareholders as victims whose franchise had been usurped'.

10 J.W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (University Press of Virginia 1970), at p. 57.

11 F.H. Easterbrook and D.R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991), at p. 112; S.M. Bainbridge, 'The Case for Limited Shareholder Voting Rights', 53 *UCLA Law Review* (2006) p. 601, at p. 625, commenting that '[g]iven human nature, it would be surprising indeed if directors did not sometimes shirk or self-deal. Consequently, much of corporate law is best understood as a mechanism for constraining agency costs'. For an interesting discussion on the forces that drive self-dealing behaviour of market participants, see L. Enriques and G. Hertig, 'Improving the Governance of Financial Supervisors', *European Business Organization Law Review* (2011) p. 357, at pp. 362-363. Cf. J.A.C. Hetherington, 'Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility', 21 *Stanford Law Review* (1969) p. 248, at p. 260, submitting that 'to a very large extent managerial aspirations are compatible with the expectations of shareholders'.

All this, in turn, has become 'the master problem for research'[12] in corporate law over the decades following its exposition. Certainly, scholarly thought on the subject has long been vociferous in identifying the change as a transformation of close corporations into public-issue corporations that is assumed to have relaxed constraints on corporate and managerial behaviour. Modern corporate legal doctrine therefore takes as its 'leading structural question'[13] the task of constraining the ability of corporate actors to abuse their discretion to take advantage of each other. Out of this inquiry, the remedy prescribed for the impotent shareholder has been the conferment of certain control rights to which the management is subject in exercising its broad discretionary powers. One might argue, certainly in respect of UK corporate law,[14] that its basic premise manifests deliberate policy choices in favour of allowing shareholders to exercise residual and ultimate sovereignty in corporations. Correspondingly, the fact that US shareholders vote and have the power to oust the board of directors and corporate management is considered to be a very powerful incentive for directors and managers to focus their attention on shareholders.[15]

As corporate lawyers are well aware, a central and energetic contemporary debate that abounds predominantly in the US, but also in the UK,[16] has concerned the

---

[12] R. Romano, 'Metapolitics and Corporate Law Reform', 36 *Stanford Law Review* (1984) p. 923, at p. 923. See also A.A. Berle, 'Modern Functions of the Corporate System', 62 *Columbia Law Review* (1962) p. 433, at p. 433. As Berle himself observed in 1962, his work with Means had achieved the status of 'folklore'.

[13] W.W. Bratton and M.L. Wachter, 'The Case Against Shareholder Empowerment', 158 *University of Pennsylvania Law Review* (2010) p. 653, at p. 655. See also L.C.B. Gower, 'Some Contrasts Between British and American Corporate Law', 69 *Harvard Law Review* (1956) p. 1369, at p. 1373, writing in 1956, Gower refers to this as one of the 'vital corporate law problems of this century'. Cf. Manning, *supra* n. 9, at p. 15, remarking that 'not even the most perfervid shareholder democrat would claim that these issues of shareholder participation constitute a national crisis or even make up a significant fraction of the public policy issues that relate to large-scale business enterprises'. It is respectfully submitted that this latter view is now outdated.

[14] M. Moore, 'Shareholder Empowerment and the Allocation of Corporate Sovereignty: UK v US Approaches', Vanderbilt-Queen Mary Corporate Law Conference 'Perspectives on Anglo-American Corporate Governance', London, 22 March 2012; Nolan, *supra* n. 4, at p. 94.

[15] L.M. Fairfax, 'The Future of Shareholder Democracy', 84 *Indiana Law Journal* (2009) p. 1259, at p. 1262; L.E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press 2001), at p. 101; Hetherington, *supra* n. 11, at p. 250. In the US, it is Section 141(a) Delaware General Corporation Law, not the shareholders, which empowers the board to manage the corporation. For a brief but useful discussion on the question of whether the constitution can change this provision and give some power back to the shareholders, see D. Kershaw, *Company Law in Context: Texts and Materials*, 2nd edn. (Oxford University Press 2012), at p. 213 et seq.

[16] This is primarily in respect of Anglo-American corporate law, which is generally assumed to follow a shareholder capitalism model. See, e.g., J.N. Gordon and M.J. Roe, eds., *Convergence and Persistence in Corporate Governance* (Cambridge University Press 2004). On the differences between the two jurisdictions, see Gower, *supra* n. 13, at p. 1369, stating that the paradigm

law which governs these decision-making powers of the shareholders.[17] It is generally accepted that shareholders, on the face of it, retain important 'quasi-participatory rights' in corporate affairs, but the extent and propriety of which is obviously open to question. This has prompted some theorists to remark that '[c]orporate law is consumed with a debate over shareholder democracy'.[18] The debate does, indeed, include many views on practically every issue, but participants fall into two schools: those who propose reform – of corporate law, of governance structure, or otherwise – and those who do not. These positions are as far apart as ever. The author is under no illusions that it would be possible to bridge the gulf between the important intellectual and political views at stake. But it is useful to provide a concise summary of the major themes in the literature on this subject, with references to the principal contributions to it. While expression of the legal issues in such terms involves a degree of oversimplification, the following characterisation nonetheless frames much of the shareholder empowerment literature.

One line of reasoning has forcefully argued normatively for increasing shareholder power (i.e., voting rights) and hence potentially shifting authority from corporate officers and directors to the corporation's shareholders, as a profound and largely beneficial mechanism of accountability, and thereby improving corporate performance and value.[19] Concerns about directors' abuse of power have encour-

---

differences between US and UK law, which directly affect the balance of power between shareholders and the board of directors, arguably derive from deep historical differences in the evolution of corporations in these jurisdictions.

17 C.M. Bruner, 'The Enduring Ambivalence of Corporate Law', 59 *Alabama Law Review* (2008) p. 1385, at p. 1422, remarking that the ambivalence of corporate law lies at the heart of the continuing discussion over the problem of the shareholder-management relationship. For two alternative perspectives that suggest the arguments here rest specifically on the ambivalence over the appropriate role of the equity investor, see J.G. Hill, 'The Rising Tension between Shareholder and Director Power in the Common Law World', 18 *Corporate Governance* (2010) p. 344, at p. 346; D.T. Mitchell, 'Shareholders as Proxies: The Contours of Shareholder Democracy', 63 *Washington and Lee Law Review* (2006) p. 1503, at p. 1506.

18 G. Hayden and M.T. Bodie, 'Shareholder Democracy and the Curious Turn Toward Board Primacy', 51 *William and Mary Law Review* (2010) p. 2071, at p. 2071. See also Bratton and Wachter, *supra* n. 13, at p. 656, commenting that the question 'holds a choice between a shareholder-driven, agency model of the corporation, guided by informational signals from the financial markets, and the prevailing legal model, which vests business decision-making in managers who possess an informational advantage regarding business conditions'. For an alternative perspective on the debate, see Mitchell, ibid., at p. 1509, advocating that 'corporate scholars have embraced two competing conceptions of the shareholders' role in the corporation: one focuses on the role of shareholders as investors, the other emphasizes the role of shareholders as potential participants in corporate management'.

19 As the evidence indicates, the quality of governance arrangements affects corporate performance and shareholder value. See generally, R. La Porta, et al., 'Investor Protection and Corporate Governance', 58 *Journal of Financial Economics* (2000) p. 3, at pp. 15-16. See also Ireland, *supra* n. 6, at p. 32, claiming that 'there is widespread agreement that shareholders have an important role to play in ensuring good governance'; A. Sykes, 'Proposals for Internationally

aged academics, practitioners and policy-makers to search for mechanisms that would increase shareholders' ability to intervene and impose arrangements addressing identified governance problems and flaws. Few US commentators seem to doubt that there is 'ample room for increasing shareholder power' under US corporate law.[20] As a concomitant to this argument, the European Commission[21] and the US[22] have initiated recent attempts at shareholder empowerment.

Although shareholders may be comparatively weaker in terms of their capacity for making a decision[23] as well as their incentives to make an informed decision,[24] corporate law provides that, in some instances, a weak and uninformed decision-maker may be better than a conflicted one. The most well-known advocate of shareholder democracy is Lucian Bebchuk,[25] a jurist famed for his outspoken fidelity to shareholder sovereignty or shareholder primacy.[26] His recent intellectual

---

Competitive Corporate Governance in Britain and America', 2 *Corporate Governance* (1994) p. 187, at p. 194, asserting that 'effective, internationally competitive corporate governance requires the efficient discharge of the ownership role'.

[20] I. Anabtawi, 'Some Skepticism About Increasing Shareholder Power', 53 *UCLA Law Review* (2006) p. 561, at p. 569; L.A. Stout, 'The Mythical Benefits of Shareholder Control', 93 *Vanderbilt Law Review* (2007) p. 789.

[21] European Commission, *supra* n. 3.

[22] Committee on Capital Markets Regulation, *supra* n. 2.

[23] F.H Easterbrook and D.R. Fischel, 'Voting in Corporate Law', 26 *Journal of Law and Economics* (1983) p. 395, at p. 397, remarking that 'the passive investors have neither the willingness nor the ability to manage'. See also Bratton and Wachter, *supra* n. 13, at p. 666, who elaborate on this problem, saying that 'dispersed, diversified shareholders labor under information asymmetries and lack business expertise'.

[24] On shareholder rational apathy, see Bainbridge, *supra* n. 1, at p. 1745, suggesting that 'shareholders lack incentives to gather information necessary to participate actively in decision-making'; J.N. Gordon, 'The Mandatory Structure of Corporate Law', 89 *Columbia Law Review* (1989) p. 1549; Easterbrook and Fischel, ibid., at p. 397, proposing that '[n]o shareholder has the right incentives to participate in governance'. Cf. B.S. Black, 'Shareholder Passivity Reexamined', 89 *Michigan Law Review* (1990) p. 520. On shareholder concerns, see, e.g., Bratton and Wachter, *supra* n. 13, at p. 656, arguing that 'the shareholders come to the table with a pure financial incentive to maximise value'; A. Smith, *An Inquiry into the Nature and Causes of Wealth of Nations* (Clarendon Press 1776, 1976 edition, R.H. Campbell and A.S. Skinner), at p. 741. Adam Smith observed that 'the greater part of these proprietors seldom pretend to understand anything of the business of the company; … giv[ing] themselves no trouble about it, … receiv[ing] contentedly such half yearly or yearly dividend, as the directors think proper to make to them'.

[25] Bebchuk (2005) *supra* n. 1, at p. 833; L.A. Bebchuk, 'The Myth of the Shareholder Franchise', 93 *Virginia Law Review* (2007) p. 675. See also Bebchuk (2006), *supra* n. 1, at p. 1784. Here, the author provides a rejoinder to some objections of sceptics who doubt the possibility or desirability of increasing shareholder power to influence corporate decision-making.

[26] For some of the leading works on the principle, see J.R. Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties', 21 *Stetson Law Review* (1991) p. 23; S.M. Bainbridge, 'In Defense of the Shareholder Maximization Norm: A Reply to Professor Green', 50 *Washington and Lee Law Review* (1993) p. 1423; J. Fisch, 'Measuring Efficiency in Corporate Law: The Role of Shareholder

endeavours outline a proposal for instrumental reform of specified areas of US corporate law or the corporation's internal structure which would enable shareholders to intervene in ongoing governance arrangements, but without undermining the important managerial role of the directors.[27] The argument rests on the basic premise that the prevailing governance model fails to provide a platform conducive to aggressive entrepreneurship and instead invites management self-dealing and conservative decision-making biased towards empire-building or institutional stability.[28] Other scholars believe that expanding shareholder democracy will lead to greater managerial accountability, thereby curbing managers' abuses of authority and ensuring that this powerful interest group focuses more on shareholder concerns.[29] Even the Delaware courts have observed that '[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests'.[30] Above all, increased shareholder rights are viewed as an alternative regulatory technique to a more stringent rules-based approach.[31]

It may seem difficult, as a rhetorical matter, to argue against shareholder empowerment. However, a second set of theorists have provided various polemical and compelling accounts that advocate against the propriety and potential effectiveness of greater shareholder involvement and in favour of increased board power and deference.[32] Though there is no one school of thought standing in

---

Primary', 31 *Journal of Corporation Law* (2006) p. 637; B. Black and R. Kraakman, 'A Self-Enforcing Model of Corporate Law', 109 *Harvard Law Review* (1996) p. 1911; D. Gordon Smith, 'The Shareholder Primacy Norm', 23 *Journal of Corporation Law* (1998) p. 277; Grantham, *supra* n. 6; L.A. Stout, 'New Thinking on "Shareholder Primacy"', UCLA School of Law, Law-Econ Research Paper No. 11-04 (18 February 2011), available at SSRN: <http://ssrn.com/abstract=1763944>; L.A. Stout, 'Bad-and-Not-So-Bad Arguments for Shareholder Primacy', 75 *Southern California Law Review* (2002) p. 1189.

[27] Bebchuk, *supra* n. 25, at pp. 696-697 (on the subject of changes to the corporate election process); and Bebchuk (2006), *supra* n. 1, at p. 1784; Bebchuk (2005), *supra* n. 1, at p. 833 (proposals to amend the corporate constitution).

[28] It might also be said that the opposite of this is true. See L.M. Fairfax, 'Making the Corporation Safe for Shareholder Democracy', 69 *Ohio State Law Journal* (2008) p. 53, at p. 55, remarking that '[m]any shareholders believe that accounting and other corporate governance scandals were caused, at least in part, by a lack of sufficient director and officer accountability'.

[29] Hayden and Bodie, *supra* n. 18, at p. 2089; R.J. Gilson, 'A Structural Approach to Corporations: The Case Against Defensive Tactics in Takeover Offers', 33 *Stanford Law Review* (1981) p. 819, at p. 836, asserting that managers 'can be expected, if otherwise unconstrained, to maximise their own welfare rather than the shareholders'.

[30] *Blasius Indus., Inc.* v. *Atlas Corp*., 564 A.2d 651, 659 (Del. Ch. 1988); *Stoke* v. *Continental Trust Co*., 78 N.E. 1090, 1093 (N.Y. 1906) (noting that shareholders' power to vote is vital).

[31] Hill, *supra* n. 17, at p. 344; L. Enriques, H. Hansmann and R. Kraakman, 'The Basic Governance Structure: The Interests of Shareholders as a Class', in R. Kraakman, et al., *The Anatomy of Corporate Law* (Oxford University Press 2009), at p. 79 (submitting that hard-edged rules and fiduciary standards are poorly suited to protecting the interests of the shareholders as a class).

[32] Bainbridge, *supra* n. 1, at p. 1735; Bainbridge, *supra* n. 11, at p. 601; Bratton and Wachter, *supra* n. 13, at p. 653; M.A. Eisenberg, 'The Legal Roles of Shareholders and Management in

opposition,[33] a number of exponents have coalesced around various versions of according management independence. These scholars typically advocate that, while the board is appointed by the shareholders, the nature of the appointment is one in which the power to be exercised is the sole prerogative of management, in order to provide it with the proper authority to manage the enterprise and avoid short-term decision-making.[34] In other words, the large modern business enterprise demands that some central body be vested with the power and discretion to make decisions on behalf of the entire corporation. Stephen Bainbridge acknowledges that '[i]n US corporation law, shareholder control rights in fact are so weak that they scarcely qualify as part of corporate governance'.[35] Still, the critic offers the perspective of one who does not wish to see any change in the perceived governance arrangements, cautioning that '[s]uch efforts to extend the shareholder franchise are fundamentally misguided'.[36] Rules according deference to managerial autonomy and severely limiting shareholder participation are seen as a deliberate choice, not a perversion, of corporate law.[37] The current regime of limiting shareholder power is preferable because it allows for centralised decision-making, which is the most cost-effective and efficient means of governing corporate affairs.[38] Similar lines of academic thought have suggested that shareholder disempowerment is not a cause

---

Modern Corporate Decision-making', 57 *California Law Review* (1969) p. 1, at pp. 16-17. For rather scathing criticisms of this and related notions, see J.A. Livingstone, *The American Stockholder* (1958), and the review of this book by B. Manning in 67 *Yale Law Journal* (1958) p. 1477. Collectivist theories, such as team production, go a step further by challenging not only the strong participatory rights for shareholders, but also any assumed primacy of their interests over the interests of other corporate constituencies. See generally M.M. Blair and L.A. Stout, 'A Team Production Theory of Corporate Law', 85 *Vanderbilt Law Review* (1999) p. 247; Stout, *supra* n. 20, at p. 789; M. Lipton and W. Savitt, 'The Many Myths of Lucian Bebchuk', 93 *Vanderbilt Law Review* (2007) p. 733.

33 Hayden and Bodie, *supra* n. 18, at pp. 2088-2095, commenting that these scholars 'disagree on the appropriate purpose and goals of the corporation and of corporate law. However, they all stand in support of a version of "board primacy" in which the board can operate in a more independent manner than shareholder primacists currently advocate.'

34 Strine, *supra* n. 1, at p. 1763, arguing that corporate law is as concerned, or more concerned, about protecting the core element of the US approach to corporate law: the empowerment of centralised management to pursue business strategies through diverse means, subject to a few important constraints.

35 Bainbridge, *supra* n. 11, at p. 616.

36 Ibid., at p. 603.

37 H. Manne, 'Our Two Corporation Systems: Law and Economics', 53 *Virginia Law Review* (1967) p. 259, at p. 261, remarking that 'if the principal economic function of the corporate form [is] to amass the funds of investors, qua investors, we should not anticipate their demanding or wanting a direct role in the management of the company'.

38 Bainbridge, *supra* n. 1, at p. 1746; Bainbridge, *supra* n. 11, at p. 624. A second concern posed by increasing shareholder power is that shareholders may use their enhanced power to advance personal or political agendas as opposed to issues that benefit the corporation as a whole. See Bainbridge, *supra* n. 1, at p. 1756.

for concern, but rather a positive attribute of corporate law, and that granting stronger powers to shareholders would encourage them to engage in predatory and self-interested behaviour.[39] Under this critique, discourse about protection of the corporation *from* investors has replaced more traditional concerns about protection *of* investors.[40]

With regard to the seldom explored nomenclature of this debate on how the corporate governance arrangements mitigate the manager-shareholder conflict, the various unarticulated accounts of shareholder power pivot around the substantive legal rules that permit shareholders to initiate and vote on proposals regarding specific corporate decisions and other issues as well. Legal and constitutional rights mark out those claims and demands which have already, as a matter of political fact, been adopted by the legal system and which have available to them some access to legal resources for their enforcement. This is not to be confused with the market for control or extraneous pressure, which, to some degree, is predicated on the existence of shareholder rights. The latter forms of shareholder initiative pressure, although no doubt weapons of some value, do not generally fall within the scope of the debate on shareholder empowerment, and they are therefore not dealt with in this article. Furthermore, the distinction between active participation in the agenda-setting sense and passive participation in a simple ratification mode is an essential aspect of the overall topic of shareholder participation in corporate governance. For convenience of exposition, the term 'power' will ordinarily refer to the specific legal rules designed to enhance shareholder participation in corporate affairs, unless stated otherwise. Through this lens, the crux of the management-shareholder problem can be opened up to examine the allocation of shareholder participatory rights and to explore the possible extent to which pervasive, path-dependent assumptions of erstwhile ultimate shareholder sovereignty or prerogative are accurate and complete.

3. THE EROSION THESIS

The shareholder empowerment debate has raised shareholder rights as a serious subject for corporate law reform. There is a large range of variables and combinations of the standard response, none of which is especially stable or commands consensus. The problem is complex, and this article takes no position on the classical debate. Moreover, a general pattern reoccurrence that can be identified as running through both sides of the conversation is the embedded assumption that, unlike in early corporate law, contemporary corporate codes permit management to perpetuate their

---

[39] G. Ingham, *Capitalism* (Polity 2008), at p. 138, describing approaches to empower shareholders as an 'attempt to re-legitimize capitalism'.

[40] R.C. Clark, 'Opening Comments, Corporate Separateness', Sixth Annual Law and Business Conference at Vanderbilt University, 31 March 2006.

own power by annulling the very shareholder rights which, in the law's view, legitimate that power.[41] The overall methodology to law advocated in Bebchuk's writings is a striking example of how the erosion thesis has conditioned the thinking of those who would reform internal governance structure and has driven some to seek return to a condition that never in fact existed. The starting point for the theory is that the 'considerable weakness of shareholders'[42] is at least in part due to 'how far [contemporary legal practice] goes to restrict shareholder initiative and intervention'.[43] This understanding of the sources of shareholder weakness complements Mark Roe's work on how the rules that produce fragmentation of share ownership weaken shareholders.[44] This logic pre-empted Lord Wedderburn, with an article published over 20 years ago, to remark that, '[i]t is widely held that "shareholder democracy" as a practicable concept is *now* "fallacious" because any idea of "shareholder control as a counter to managerial power is baseless".'[45]

At the same time, while the erosion thesis characterises, in a systematic way, the scholarly endeavours of academics concerned about the uneven balance of power between managers and shareholders, it is more pervasive than this. Those who have their doubts typically do not reject the erosion doctrine in its entirety. Instead, they tend to accept the paradigm as a pivotal conceptual postulate to develop what they consider to be a more fully rounded theory of corporate law. For instance, Bainbridge opines that '[b]ecause the power to hold to account differs only in degree and not in kind from the power to decide, one cannot have more of one without also having less of the other'.[46] An inference that one could draw from this latter point, on which the overall thesis is predicated, is the acceptance of the view that the traditional enabling-law philosophy, excessively aggressive efficiency rationales, and powerfully focused managerialist strategies have combined to weaken an already inarticulate faith in the primacy of owner over manager. It is a natural corollary of this assumption that the autonomy of the board should take priority, if not complete precedence, over the shareholders. Correspondingly, Leo Strine suggests that, due to the economic imperatives and demands of modern commerce, a necessary characteristic of the corporate form is to free up management to man-

---

41 J. Johnston, 'The Influence of "The Nature of the Firm" on the Theory of Corporate Law', 18 *Journal of Corporation Law* (1993) p. 213, at p. 221, making the observation that Berle's and Mean's normative approach mirrors perfectly the dominant scholarly method adopted by law professors of their own generation and in contemporary legal scholarship.

42 Bebchuk (2005), *supra* n. 1, at p. 842.

43 Ibid., at p. 848.

44 M.J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton University Press 1994); Enriques, Hansmann and Kraakman, in Kraakman, et al., *supra* n. 31, at p. 72, submitting that due to the emergence of delegated decision-making in the corporate form, corporate law is sparing in mandating direct decision rights for shareholders.

45 Lord Wedderburn, 'Control of Corporate Actions', 52 *Modern Law Review* (1989) p. 401, at p. 401 [my emphasis added].

46 Bainbridge, *supra* n. 11, at p. 626.

age. This means that the historical significance of the need to strengthen or modify shareholder rights in corporate governance, described here as 'a few important constraints'[47] on management's 'great deal of authority',[48] has come to coalesce around the view that it is a suboptimal goal of contemporary corporate law.

Taken together, these views would have it that the corporation has somehow strayed from the path of reason and responsibility by disregarding legal norms once relevant to corporate governance. This understanding of history has been extremely influential. Former Chairman Harold Williams of the Securities and Exchange Commission speaks of a need to revitalise shareholders' democracy weakened by the disappearance of 'historic and traditional' shareholders.[49] Lewis Gilbert declares that management has usurped shareholders' rights by absolute control of the proxy machinery.[50] John Kenneth Galbraith finds it 'commonplace' that shareholders have lost their powers to managers.[51] Ralph Nadir rests far-ranging proposals for corporate reform on the 'collapse' of state law and 'evisceration' of shareholder power.[52] J.A.C. Hetherington reflects on previous legislative attempts to 'restore the shareholder to power' after 'becoming the functionless rentier'.[53] Frank Emerson and Franklin Latcham sought to restore 'some measure of control to the stockholder-owners of our modern corporations'.[54] Bayless Manning tells how the whole body of corporation law 'slowly perforated and rotted away' and became today's 'great empty corporate statutes – towering skyscrapers of rusted girders … containing nothing but wind'.[55] John Maynard Keynes saw that managerial capitalism had caused the 'euthanasia of the shareholder'.[56] Each describes or suggests a process of erosion; once effective shareholder control or legal rules, or both, 'withered and died, and is no more'.[57]

---

47 Strine, *supra* n. 1, at p. 1762 et seq.

48 Ibid.

49 H. Williams, 'Corporate Accountability' in D.E. Schwartz, ed., *Commentaries on Corporate Structure and Governance* (American Law Institute-American Bar Association Committee on Continuing Professional Education 1979), at p. 517.

50 The Role of the Shareholder in the Corporate World: Hearings before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Judiciary Committee, 95th Cong., 1st Sess., pt. 1 (1977) (Statement of L. Gilbert), at p. 67.

51 J.K. Galbraith, *The New Industrial State*, 3rd edn. (Houghton Mifflin 1978), at p. 52.

52 R. Nadir, M. Green and J. Seligman, *Taming the Giant Corporation* (Norton 1976), at pp. 33 and 46.

53 Hetherington, *supra* n. 11, at p. 255.

54 F.D. Emerson and F.C. Latcham, *Shareholder Democracy* (Western Reserve University Press 1954), at p. 8.

55 B. Manning, 'The Shareholder's Appraisal Remedy: An Essay for Frank Coker', 72 *Yale Law Journal* (1962) p. 223, at p. 245.

56 J.M. Keynes, *The General Theory of Employment, Interest, and Money* (Harcourt, Brace and World 1936), at p. 376.

57 Werner, *supra* n. 4, at p. 1613. See also Bainbridge, *supra* n. 11, at p. 620, remarking that 'Berle and Means believed that this separation of ownership and control was both a departure from historical norms and a serious economic problem. They were wrong on both counts'.

The problem, in short, is that classical corporate law thinking on the manager-shareholder conflict inextricably accepts and embeds fundamental assumptions leading to a set of overall conclusions on the attenuation of the shareholder's original legal rights and control position back to the earliest corporations. It is the contention of this article that this narrative is a misstatement of the legal position and, to an extent, the factual reality. Although the formally declared policy and the public's perception of that policy might have expressed concern for shareholder control of UK and US corporations, the notion that the law ever achieved effective shareholder regulation of corporate affairs is fallacious.[58] While this view is articulated most frequently in respect of corporations which have widely dispersed ownership in the US, there is nothing to suggest that the situation has been, in practice, any different in the United Kingdom. Richard Nolan observes that '[t]he first modern companies legislation in the United Kingdom, the Companies Act 1862, said nothing about the rights of control shareholders were to have in a company'.[59] Nolan goes on to remark that '[a]ll the rest of the rules about what rights of governance shareholders were to have, and how they were to exercise them, were to be found in the company's articles of association'.[60] Elsewhere, however, he observes that 'lawyers instructed by a company's directors usually draft its articles (and subsequent amendments to, or replacements of, them) in terms which reflect what the directors want, tempered by the directors' good faith to shareholders and, in some cases, by their appreciation of what the shareholders will accept'.[61]

The main weakness, it is argued, is that the erosion doctrine is not given any obvious conceptual underpinnings; it is presented *ex cathedra* and then specific points ensue. In this regard, it is possible to cull bits and pieces of history that appear to sustain the variants of the erosion doctrine, but it is far easier to establish that early corporate law did not facilitate greater active control by shareholders of their property than it is to prove the contrary. L.C.B. Gower once remarked that 'of all the branches of law [corporate law] is perhaps the one least readily understood except in relation to its historical development'.[62] To the extent that this is true, such flawed readings of history by pre-eminent scholars and practitioners of corporate law, many of whom are famed for their fidelity to the facts, are puzzling. We can only speculate on the origins of their misconceptions, but all seem to have

---

58 Hurst, *supra* n. 10, at p. 104. Hurst, relying on authorities not available to Berle and Means, examines the development of corporate law far more systematically and intensively than either. See also W.E.F. Hoyle, *The Game on Wall Street* (J.S. Ogilvie Publishing 1898).

59 Nolan, *supra* n. 4, at pp. 98-99.

60 Ibid.

61 Ibid., at p. 96.

62 P.L. Davies, *Gower's Principles of Modern Company Law* (Sweet and Maxwell 1997), at p. 18. The most recent editions of Gower were produced by Paul Davies, but the section referred to in this section is largely unchanged from early editions (and, indeed, does not appear in later ones) so I have, therefore, attributed the view expressed to Gower rather than to Davies.

viewed their source materials through the lens of an inflexible preconception of what those materials *should* reveal. A simple point is well made by Jason Scott Johnston, with an article published in 1993, who wrote that '[i]t is a characteristic of classical legal scholarship generally, and corporate legal scholarship in particular, that it considers a question to be worth exploring only insofar as the analysis and solution of the problem lead necessarily to a proposal for doctrinal reform'.[63] There would, however, be a serious problem if legal scholars 'too often embrace[d] a research paradigm that fit[ted] a rather narrow conceptualisation of the entirety of corporate governance to the exclusion of alternative paradigms'.[64]

Though the case is not clear-cut, there is indeed some sense that the legal scholarship and practice on shareholder's legal rights is far more path-dependent than commentators have acknowledged. Two conflicting accounts of the diminution of shareholder participatory rights have garnered widespread approval. First, it would seem that academics who are concerned about the attenuation of shareholder control typically import the erroneous assumption of the weakening of the shareholder's legal position in corporate affairs to advocate increasing these rights to improve the shareholder's position. Second, those who support the independence of the board tend to incorporate it as a pivotal analytical construct and use it as a point of departure so as to maintain the prevailing orthodoxy. These assertions, it is argued, have not necessarily been supported by valid or any foundations. This means that much of what passes for legal research on the subject, at least to some measure, can be criticised not so much for a lack of originality, but specifically because of excessive insularity.[65]

For the sake of argument, Robert Solo understands the drivers of scholarly thought in a more sophisticated way, saying in 1993 that

> [g]enerally it is the case … that theory nests within ideology. Furthermore, both theory and ideology rest upon what Jean Piaget, Claude Lévi-Strauss, and Noam Chomsky might call a *cognitive structure*, what Michel Foucault calls an *episteme*, Kuhn a *paradigm*, Althusser a *problematic*, that is, upon a system of conceptualisation and a body of presuppositions that frame the field of controversy, shape outlook and the character of inquiry, and determine the meaningfulness of the question and the significance of the problem.

---

63 Johnston, *supra* n. 41, at p. 221.

64 C.M. Daily, D.R. Dalton and A.C. Canella, 'Corporate Governance: Decades of Dialogue and Data', 28 *Academy of Management Review* (2003) p. 371, at p. 379.

65 On the criticisms of legal scholarship generally, see D.L. Rhode, 'Legal Scholarship', 115 *Harvard Law Review* (2002) p. 1327, at pp. 1333-1336 and 1339-1342; K. Lasson, 'Scholarship Amok: Excesses in the Pursuit of Truth and Tenure', 103 *Harvard Law Review* (1990) p. 926, at pp. 942-948; R. Zimmerman, 'Law Reviews: A Foray Through a Strange World', 47 *Emory Law Journal* (1998) p. 659, at pp. 677-681 and 689-690; P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', 97 *Georgetown Law Journal* (2009) p. 803, at p. 808.

Following on from this, Solo notes that

> [t]he theory is different from these deeper strata of thought in the degree that the latter are embedded in the unconscious. They belong to the realm of the self-evident, of the unquestionable, parameters not simply sets of thoughts but of the process of thought itself.[66]

Whatever the underlying reason for embracing the erosion thesis, the fact that a dominant theory of corporate action may have certain inaccurate logics that have a substantial impact on the path of the perceived distribution of decision-making power has been increasingly ignored by the scholarship. Without clarification, the law's existing understanding of shareholder voting rights is inaccurate and the dominant scholarly lens through which to view this issue is positioned in the wrong place.

4. DISTRIBUTION OF CORPORATE POWER

The core dimensions of corporate law in any given jurisdiction are in important part a consequence of that country's particular pattern of corporate ownership,[67] which is in turn determined, at least in part, by forces exogenous to corporate law and the prevailing variety of capitalism.[68] This means that the nature and extent to which any given corporate law structure mitigates the manager-shareholder conflict reveals various institutional differences in how the law deploys formal accountability mechanisms in legitimating corporate managers' continuing possession and exercise of discretionary administrative power.[69] More specifically, though it is a universal legal characteristic of the investor-owned business corporation to have delegated management under a board structure, the standard legal forms for enter-

---

66 R.S. Solo, 'Neoclassical Economics in Perspective', in W.J. Samuels, ed., *The Chicago School of Political Economy* (Transaction Publishers 1993), at p. 48.

67 For a brief but useful discussion on patterns of corporate ownership, see L. Armour, H. Hansmann and R. Kraakman, 'Agency Problems and Legal Strategies' in Kraakman, et al., *supra* n. 31, at pp. 29-32.

68 On the varieties of capitalism, see, e.g., P.A. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001); D. Coates, *Models of Capitalism: Growth and Stagnation in the Modern Era* (Polity 2000); R. Dore, W. Lazonick and M. O'Sullivan, 'Varieties of Capitalism in the Twentieth Century', 15 *Oxford Review of Economic Policy* (1999) p. 102.

69 Recent scholarship has emphasised the difference among European and American corporations in corporate governance, share ownership, capital markets and business culture. See, e.g., M.J. Roe, 'Some Differences in Corporation Structure in Germany, Japan, and the United States', 102 *Yale Law Journal* (1993) p. 1927; K.J. Hopt and E. Wymeersch, eds., *Comparative Corporate Governance: Essays and Materials* (De Gruyter 1997).

prise organisation qualitatively differ among jurisdictions in their allocation of the right to participate in control and the dynamics of shareholder power. The focus here is on UK and US, rather than continental European jurisdictions, which are beyond the scope of our enquiry.[70] Suffice to say that even among the corporate codes in the UK and the US there are very real differences, but also underlying similarities, in the treatment of shareholder intervention. The next section turns its attention to a brief examination of the core dimensions of the basic governance structure in these two countries.

4.1 Decision rights in the UK

In respect of UK corporate law, most texts and commentaries[71] point to the shareholder body retaining residual and ultimate decision-making authority through statute, case law and the shareholder approval requirements in UKLA's Listing Rules in decision areas that appear to raise acute agency problems arising from a direct conflict of interests. Certain of these controls, shareholders are purported to have various fundamental instruction and veto or approval rights, among which the right to vote on a limited number of end-game governance issues in a general meeting[72] and the right to sell their shares.[73] Corporate law is considered to grant the right to vote on the appointment and removal of directors.[74] Many scholars would also point to the notion that shareholders have the right to initiate legal

---

[70] For an examination of the different dynamics of managerial power and the mechanics of shareholder voting in a handful of major representative jurisdictions, including France, Germany and Italy, see M. Siems and D. Cabrelli, eds., *Comparative Company Law: A Case-based Approach* (Hart 2013) (especially Part 3); L. Enriques, H. Hansmann and R. Kraakman, in Kraakman, et al., *supra* n. 31, at Chapter 3; M.J. Roe, *Political Determinants of Corporate Governance* (Oxford University Press 2003) (especially Part IV); T. Baums and E. Wymeersch, eds., *Shareholder Voting Rights and Practices in Europe and the United States* (Kluwer 1999).

[71] Kershaw, *supra* n. 15, at p. 189 et seq.; P.L. Davies, *Gower and Davies: The Principles of Modern Company Law*, 8th edn. (Sweet and Maxwell 2008), at p. 411 et seq. But see Nolan, *supra* n. 4, at p. 93, who advocates that the doctrinal rights of shareholders are manifested in companies legislation, while cases about shareholders' rights have only an 'interstitial function, clarifying and fleshing out the relevant legislation and corporate documentation'.

[72] It is well established that UK directors, not shareholders, manage the business. See CA 2006, Model Articles, regs 3-4; *Automatic Self-Cleansing Filter Syndicate Co Ltd* v. *Cuninghame* [1906] 2 Ch 34; L. Sealy and S. Worthington, *Cases and Materials in Company Law* (Oxford University Press 2008), at p. 167 and Chapter 4. For US examples, see, generally, Del. Code Ann. Tit. 8, s141(a) (2001); Model Bus. Corp. Act s8.01(b); *Paramount Communications, Inc.* v. *Time, Inc*., 571 A.2d 1140, 1154 (Del. 1989); *Charlestown Boot & Shoe Co.* v. *Dunsmore*, 60 N.H. 85, 87 (1880).

[73] Under the corporate law of UK and US state law, the usual rule is that shares of stock are freely transferable. Corporate legislations do not see the need to specify the basic right of property, but it is implicit in statutory provisions regulating restrictions on share transfer.

[74] Section 168 Companies Act 2006.

proceedings for breaches of directors' duties.[75] Still, shareholder rights are far narrower than this cursory description suggests. It has been observed that there is a 'certain artificiality'[76] about the way the machinery of corporate democracy works in respect of the modern corporation. First, under the corporations legislation, and standard articles of association (as interpreted by the courts in the twentieth century), the board of directors is the most important day-to-day organ in the corporation. The board is given the power to manage the business of the corporation, and the general meeting is not permitted to interfere with its exercise.

While the general meeting does, however, retain ultimate power in that it has various perceived approval and proposal rights, the second problem is that a number of these rights are default rules. They are subject to change by contractual arrangement, either in the articles of association or otherwise. Equally, even the default rules are subject to legal restriction in various other areas of law. Of larger concern, however, is that voting rights suffer from basic recurrent dilemmas of collective action among self-interested individuals.[77] To make effective use of voting rights the shareholder needs to invest in research about the corporation and in communication and coordination efforts with other shareholders. However, the gains from voting that effectively polices managerial responsibility accrue to all shareholders, and shareholders benefit from the efforts of their peers, whether they contribute to them or not. Therefore, shareholders tend to be 'rationally apathetic'. They usually do not engage in active monitoring, either because the returns to the holdings of any one shareholder from monitoring would not warrant the costs to that shareholder (even though shareholders would benefit in the aggregate from monitoring by more than its costs) or because shareholders who would gain enough individuality to justify efforts hope to 'free-ride' on the efforts of their peers.

4.2 **Decision rights in the US**

To contextualise the balance of power in UK corporations, it is helpful to look at how the US addresses the distribution of power issue. In contrast to the position in the UK, under Delaware corporate law (the de facto national corporate law of the

---

[75] In many common law jurisdictions, provision is made in corporations legislation for the bringing of derivative actions: Companies Act 2006 ss260-64 (UK); Canada Business Corporations Act 1985 s239 (Canada); Corporations Act 2001 Part 2F1A (Australia); Companies Act s216A (Singapore); Companies Act 1993 s165 (New Zealand); and Companies Ordinance s168BC (Hong Kong). The US retains a common law derivative action, the paternity of which can be traced back to *Robinson* v. *Smith* 3 Paige Ch 222 (N.Y. 1832). But see J.C. Coffee Jr, 'Unstable Coalitions: Corporate Governance as a Multi-Player Game', 78 *Georgetown Law Journal* (1990) p. 1495, at p. 1496.

[76] J. Birds, et al., *Boyle and Birds' Company Law*, 7th edn. (Jordans 2009), at p. 421.

[77] For a useful examination of a number of problems that shareholders have in exercising voting rights, see A. Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders', *Journal of Business Law* (2007) p. 656.

US) the default position is set clearly in favour of the board.[78] The principal reason for this is because the authority of the board to exercise the powers of the corporation is considered to be provided by statute rather than originally located with the shareholder body.[79] The distribution of power, theoretically, could be altered to provide shareholders in a US corporation with instruction rights, but in practice one does not see amendments to the certificate of incorporation.[80] Nonetheless, the Delaware General Corporation Law does provide for shareholder approval rights, by majority resolution, in relation to one type of significant transaction, namely, the sale (not the purchase) of assets which amount to 'all or substantially all'[81] of the assets of the corporation. Certainly, for listed corporations, UK significant transactions regulation with its 25 per cent value threshold is far more intrusive into board managerial authority than US regulation. Similarly, the use of veto rights as a tool to regulate agency problems is less common in the US than in the UK. For example, shareholders do not have rights of approval in relation to share issues, and direct conflicts of interest are typically dealt with through board approval or court review rather than shareholder approval. While the power to amend the corporation's constitutional documents is originally located with the shareholder body, the certificate can,[82] and typically does,[83] provide that the directors have the power to amend or repeal the by-laws. In other areas, for example, 'end-game' corporate decisions such as mergers, as in the UK, shareholder approval is required.[84]

Under the position in US corporate law, the shareholder body reserves the right to vote on the appointment and removal of directors.[85] There are two default positions in relation to the rights given to shareholders to remove directors from office. If the corporation has a classified board, then the default rule is that directors can only be removed 'for cause'. The certificate of incorporation can be amended to provide 'without cause' removal, but in practice a considerable number of large US corporations have classified boards providing for 'with cause' removal. Although there has been relatively limited judicial attention to the meaning of the term, one can only conclude that this right is reserved only for the most egregiouscases.[86] If a

---

[78] W.W. Bratton, 'Confronting the Ethical Case Against the Ethical Case for Constituency Rights', 50 *Washington and Lee Law Review* (1993) p. 1449, at p. 1475, remarking that '[c]orporate law is an institution that holds a commitment to management'.

[79] Section 141(a) Delaware General Corporation Law. The board's power, accordingly, is said to be 'original and undelegated'.

[80] Kershaw, *supra* n. 15, at p. 213 et seq.

[81] Section 271 Delaware General Corporation Law.

[82] Section 109 Delaware General Corporation Law.

[83] *Kurz* v. *Holbrook* 989 A.2d 140 (2010), remarking that 'the charters of Delaware corporations routinely grant this authority to the board'.

[84] Section 251 Delaware General Corporation Law.

[85] Section 141(k) Delaware General Corporation Law.

[86] *Ralph Campbell* v. *Loew's Incorporated* 134 A 2d 565 (Del 1957). The case also provides that if a director is to be removed for cause the director must receive adequate notice of the

corporation does not have a classified board, then the removal right is a 'with or without cause' removal right identical to the removal right set forth in the UK corporations legislation. Of course, in order to remove directors in between annual general meetings the shareholders would have to be able to convene an interim meeting. But they would only have this right in a US corporation if it is explicitly granted to them in the certificate of incorporation or the by-laws, which in many corporations is not the case.[87] Above all, it should not be forgotten that analogous to the UK, shareholder voting in the US has had 'a very uneven history'.[88] Directors and management tenure in a US corporation is, therefore, significantly more secure than in the UK.

5. Rethinking shareholder rights

The proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as an act the sole purpose of which is to achieve something else has been commonplace for over a century. There is, however, no justification for assuming, because this attitude has now achieved respectability and even triteness, that it enjoys a pervasive application in practice. We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simply inquiry: toward what end is this activity directed? In no field is this more true than in that of shareholder legal rights. The evisceration of shareholder rights envisaged by traditional corporate legal knowledge has profoundly influenced the debate on who does, and who should, control the modern corporation. It has helped not only to define the issues, but to stimulate the debate itself. In this article, that assumption is questioned; the internal devices to protect shareholders from managerial discretion, it is argued, have not eroded but remained constant and unchanged. For, in the assessment of these rights, the law tends to be conceived, not as a theoretical and political understanding of distribution, or redistribution, of power, but as being organised around the definite detailed legal consequence to a definite detailed state of fact.

---

charges and an opportunity to rebut them. See further *Bossier* v. *Connell* WL 12785 (Del Ch 1986).

87 Section 211(d) Delaware General Corporation Law. While the shareholders acting alone could amend the by-laws to include such a right, they cannot do so if the certificate explicitly excludes such a right (section 109b) providing that the by-laws can contain any provision *not* inconsistent with the certificate.

88 L. Lowenstein, 'Shareholder Voting Rights: A Response to Sec Rule 19c-4 and to Professor Gilson', 89 *Columbia Law Review* (1989) p. 979, at p. 980, bemoaning the historical tendency of shareholders to vote like sheep, and yet the corporate law academy have always insisted on preserving at least the 'opportunity for the operation of corporate suffrage'.

Corporate law scholars agonising over and debating shareholders' legal rights and constitutional rights have, as of yet, failed to synthesise, to rationalise and to expound the ideological character of rights; classical legal exposition is concerned mainly with ordering a corpus of knowledge, and questions about the fundamental and theoretical core or essence of such rights are typically unchallenged. This article contends that without a wider and reflective theorisation of the problem of shareholder rights, it will not be possible to move beyond the simple opposition between 'for' and 'against' rights stances. A tough and coherent theorisation should assist in advancing a more powerful perspective of rights, a perspective of rights without illusions. In order to discuss the valuable contribution, with respect to both research and practice, which political philosophy can and should make to the study of shareholder legal rights, this theorisation will be done primarily by examining a developing literature on the theory of legal rights and constitutional rights, which holds great promise for its applicability to shareholder participatory rights.

The philosophical study of rights has long been a subject of interest to legal scholars and practitioners.[89] One distinguished American legal scholar, writing in 1922, remarked that '[t]he great juristic achievement of the nineteenth century is the thorough working out of a system of individual legal rights'.[90] The idea that legal rights have some intrinsic value is widespread in the contemporary era.[91] A familiar proposition of political philosophy is that rights claims can make a statement of entitlement that is universal and categorical. The idea of rights has often been seized on as a way of avoiding the casuistry of arcane computations of the utilitarian calculus – a way of insisting that certain basic rights are to be secured and certain deleterious behaviour prohibited.[92] Different theories will identify different individual rights – to freedom, independence, dignity, etc. – as having fundamental and abiding importance, and they will regard a sense of that impor-

---

[89] J. Waldron, *Theories of Rights* (Oxford University Press 1984); B. Ackerman, *Social Justice in the Liberal State* (Yale University Press 1980); J. Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); R. Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974); S. Scheingold, *The Politics of Rights* (Yale University Press 1974); W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913) p. 16. This list is by no means complete. For a useful overview of some important literature on the subject, see J.W. Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', *Wisconsin Law Review* (1982) p. 975.

[90] R. Pound, 'The Theory of Judicial Decision', 36 *Harvard Law Review* (1922) p. 802, at p. 805.

[91] F. Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Own Rights', 6 *Duke Law Journal* (1973) p. 1153, at p. 1177. Cf. P. Jones, *Rights: Issues in Political Theory* (Palgrave 1994), at p. 1, cautioning that '[t]here are also some contemporary cultures for which the idea of rights is said to be an alien intrusion'.

[92] Nozick, *supra* n. 89, at p. ix, points out that '[i]ndividuals have rights and there are things no person or group may do to them (without violating their rights)'.

tance as a general basis for normativity within the theory.[93] Most modern theories of rights commit themselves to democratic rights: the right to participate in the political process through voting, speech, activism, and so on.[94] It is easily assumed that the typical ascription of rights to vote in the election of a UK-US corporation's board of directors and on other major issues facing the corporation translates directly into an extension of the actual protection of those rights within political philosophy.[95] It has been suggested, adroitly, that the theory of rights 'forms a major part of the cultural capital that capitalism's culture has given us'.[96] In this regard, the participatory rights of shareholders, in their logical form, are best understood as 'conceptual markers',[97] used to designate a subset of legitimate interests or entitlements that warrant a privileged status in corporate law.

Despite an extensive and powerful defence of the relevance and value of rights,[98] a diverse range of positions are hostile towards the illusions generated by the liberal 'myth of rights'.[99] For instance, Mark Tushnet has disputed the claim that 'the idea of rights is politically useful' and argued that 'the idea of rights is affirmatively harmful to the party of humanity'.[100] The scepticism concerning rights is, of course, not new. It can be found in the writings of conservatives like Burke as well as progressives and radicals such as Bentham and Marx.[101] More recent voices have taken the form of both general theoretical critiques of rights[102] and conclusions derived from the study of the experience of particular social or political move-

---

93 J. Waldron, 'A Rights-Based Critique of Constitutional Rights', 13 *Oxford Journal of Legal Studies* (1993) p. 18, at p. 21.

94 Ibid., at p. 36, on a theory of rights that accorded no special importance to the exercise of powers of political deliberation, the commentator submits that '[i]t would be a rather Whiggish Lockean theory of the Augustan Age, emphasizing only rights to life, property and civil liberty, and regarding political participation in elections and so on as strictly one instrument among others to secure those ends'.

95 Eisenberg, *supra* n. 32, at p. 4, remarking that '[c]orporate law is constitutional law; that is, its dominant function is to regulate the manner in which the corporate institution is constituted, to define the relative rights and duties of those participating in the institution, and to delimit the powers of the institution vis-à-vis the external world'.

96 M. Thushnet, 'An Essay on Rights', 62 *Texas Law Review* (1984) p. 1363, at p. 1363. This sentiment echoes the earlier views of Karl Marx, who considered rights to be part of the ephemeral bourgeois ideology thrown up by capitalism.

97 J.L. Coleman and J. Kraus, 'Rethinking the Theory of Legal Rights', 95 *Yale Law Journal* (1986) p. 1335, at p. 1342.

98 Dworkin, *supra* n. 89; R. Dworkin, *Law's Empire* (Hart 1998).

99 Scheingold, *supra* n. 89.

100 Thushnet, *supra* n. 96, at p. 1384. Cf. A. Bartholomew and A. Hunt, 'What's Wrong with Rights?', 9 *Law and Inequality* (1990) p. 1, at p. 17 (disputing Thushnet's criticisms of the political utility of rights).

101 J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge 2010).

102 Thushnet, *supra* n. 96; P. Gabel, 'The Phenomenology of Rights – Consciousness and the Pact of the Withdrawn Selves', 62 *Texas Law Review* (1984) p. 1563.

ments.[103] Central to this perspective is an understanding of the dynamic interrelationship of rights and a hegemonic order, as well as the ways in which rights discourse can reinforce alienation and passivity. For, an increasing scepticism and suspicion of rights theory and rights discourse concerns the capacity of rights to produce and entrench illusory, rather than genuine, forms of equality, individuality and community. Rights have been criticised for introducing false abstractions[104] that deny meaningful participation while entrenching real differences and concrete identities, and for promoting egoism and atomism at the expense of community and solidarity.[105] At the same time, these illusory forms contribute significantly to the persistence of a capitalist system which necessarily precludes the realisation of genuine equality, individuality and community.[106] In other words, rights are double-edged; if rights codify, even if they may slightly mitigate, certain modalities of subordination or exclusion, these rights are constructs that perpetuate the very powers they were designed to confront.[107]

As a number of scholars have shown so clearly in their respective studies of the labour and the civil rights movements,[108] the long-term effects of a legal strategy based primarily on the acquisition of legal rights tends to weaken the power of popular movements because such a strategy allows the institutional order to define the terms of the power dynamic. Let us consider the example of the labour rights movement. The internally contradictory roles and setting of collective bargaining law have precipitated two great challenges to theorists guiding and fostering its development from the traditional liberal perspective. The first is to explain how and why collective bargaining law simultaneously encourages and represses workers'

---

[103] R.W. Gordon, 'Some Critical Theories of Law and Their Critics', in D. Kairys, ed., *The Politics of Law* (Basic Books 1998) p. 641; J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press 1979).

[104] A. Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies', 17 *Journal of Law and Society* (1990) p. 309, at p. 321, noting that the most persistent objection against rights, articulated most fully in the Critical Legal Studies movement's critique of rights, is precisely the universalistic form of rights which embodies their abstraction and thus manifests their inherent reification.

[105] K. Baynes, 'Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights', 28 *Political Theory* (2000) p. 451, at p. 452.

[106] I.D. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law', 11 *Law and Society* (1977) p. 571, at p. 580.

[107] W. Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995), at p. 115.

[108] K. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941', 62 *Minnesota Law Review* (1978) p. 265; K. Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law', 4 *Industrial Relations Law Journal* (1981) p. 450; S. Lynd, 'Government Without Rights: The Labor Law Vision of Archibald Cox', 4 *Industrial Relations Law Journal* (1981) p. 483; A. Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine', 62 *Minnesota Law Review* (1978) p. 1049.

self-expression through the medium of industrial conflict. While collective bargaining law, on the one hand, invites and authorises workers to void and advance their needs through self-organisation and collective action, at the same time it limits worker self-expression through industrial conflict by establishing a co-opting, atomising, struggle-dissipating framework that narrowly circumscribes the lawful boundaries of collective action. That is, the ultimate impact of collective bargaining law in many settings may well be to impede solidarity and mutual aid and to narrowly channel collective action into limited, institutionalised forms. Traditional liberal theorists of collective bargaining law have had to explain, secondly, how this body of law simultaneously authorises and limits employee participation in workplace governance. For, although collective bargaining law acknowledges the justice of worker participation in the industrial decisions affecting workers' lives, it also controls and restricts that participation.[109]

In order to understand the significance of the double-edged nature of rights in the corporate law context, it is important to provide a right-based critique of the doctrinal rights of shareholders. What might a perspective from critical legal analysis add to this picture of assumed withering shareholder legal rights? Robert Gordon explains that critical legal theories challenge the core argument of most legal thought: that nothing important can change.[110] 'The dominant message of orthodox legal training was then and still is today that a basically unalterable value consensus, a basically unchangeable system of economic and political realities, a basically frozen system of legal understandings and institutions, fix rigid outer boundaries to thinkable social change.'[111] The point is a general one and can be applied to other types of doctrinal incoherencies as well. Peter Gabel and Paul Harris have remarked that '[t]oo many of us have tended to accept uncritically the model of the legal system that we learned in law school, a model that pictures the legal system as a set of institutions designed to protect and vindicate people's rights'.[112] The writers go on to chastise the mistaken assumption that

> [i]t is not a sufficient or even an accurate critique of this model to say that [hegemonic order] controls the legal system and therefore keeps oppressed people from getting their rights, because such a critique continues to assume that the legal system is principally concerned with rights-distribution rather than with the control of popular consciousness through authoritarian and ideological methods (one of which is the belief in 'rights' itself).[113]

---

109 Klare (1981), ibid., at pp. 454-455.

110 Gordon, *supra* n. 103, at p. 641.

111 Ibid., at p. 643.

112 P. Gabel and P. Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', 83 *New York University Review of Law and Social Change* (1982) p. 369, at p. 376.

113 Ibid.

However, the intellectual history of the field is complicated by the fact that, from its outset, shareholder rights law has endorsed and to some extent has actually engendered the democratic participation of shareholders in corporate governance. Central to this perspective is an understanding of the dual and contradictory potential of rights claims and rights consciousness to blunt and advance power relations. Indeed, the idea is that as much as rights are basic tools of democratic shareholder power, they are also corporate instruments of legitimising oppression. Kenneth Baynes supports this impulse when he suggests that '[r]ather than functioning as forms of resistance to oppression and the abuse of power, rights are themselves complicit in the expansion of disciplinary power'.[114] A number of academics have said that these rights are conceived as being granted to the individual from an external source, from a hegemonic institution, such as a state, or in this case the legal system, which either creates them (in the positivist version of the constitutional thought-schema) or recognises them (in the natural law version) through the passage of laws. Therefore, insofar as shareholders emerge from their passive position to act and interact with other shareholders or the industrial enterprise on the basis of their rights, they do so *because they have been permitted to do so in advance*.[115] By granting rights or new rights that seem to vindicate the claims of the single shareholder, or affiliated group of shareholders asserting them, the corporation can succeed, over time, in co-opting the movements' more excessive demands while re-legitimising the status quo through the artful manipulation of legal doctrine. This excessive preoccupation with the appeal to rights inherently entrenches and reiterates that the source of power resides in the economic institutions rather than in the shareholders themselves.

The rapid international expansion of corporations in the second half of the twentieth century led to an intriguing double movement in the forms of business regulation. The dominant trend has been to facilitate that expansion, by liberalisation of national controls on investment capital flows, but this has been accompanied by measures to strengthen international legal protection of the rights of owners of such investments. This latter point is important because, in spite of mandatory statute law taking some of the space formerly occupied by the corporation's constitution, the last century has in fact seen a proliferation of shareholder governance rights since the first modern corporations legislation. Also significant is that the legal conception of the various aspects of the shareholder's status in the corporation did not change appreciably during the previous century. However, this has been counterpointed by the rise and development of global industrial capitalism; so these real gains have only deepened the legitimacy of the system as a whole. It might appear incongruous to suggest that two purportedly contradictory notions can, at the same time, be inextricably linked to one another, such as the liberating and constraining

---

[114] Baynes, *supra* n. 105, at p. 453.
[115] Gabel, *supra* n. 102, at p. 1576.

aspects of legal rights. But while the law clearly grants shareholders the rights to vote on certain matters and to sell their shares, a basically unchangeable system of economic and political realities mediate these rights so as to fit into a framework of legal regulation that certifies the legitimacy of power relations of hierarchical domination, and one of the primary functions of law is to maintain and reproduce those hierarchies. This is Antonio Gramsci's notion of hegemony, i.e., that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.[116]

With the nature of shareholders' legal rights duly accounted for, it is appropriate to pause and seek to discern the plausible trajectory of thinking on the subject. The first point is that the allocation of power within a corporation is a problem that never goes away, whether from policy agendas in academic corporate law or in the wider economy and polity. In at least one respect, one might argue that the only meaningful authority held by shareholders over different parts of the corporate governance process is predicated upon private property rights – the threat to sell shares in the corporation they invest in – which obviously acts as a form of market for corporate control. But it is important to distinguish this type of right from the conceptually different approval and proposal rights that form the focus of this article. While much of the existing literature views these latter rights through the lens of having been steadily eroded over time, it is submitted that the efficacy of such a theory is open to challenge. Clearly, the idea of giving shareholders more power over corporate decisions has wide appeal among those who believe shareholders need adequate means to control managerial-agency problems. On the other hand, critics of enhanced shareholder rights argue that this strategy would be a pernicious influence that can worsen corporate decisions by inducing management to inefficiently accommodate extreme shareholder groups. However, and less obviously, such arguments tend to abstract away from the fact that the very nature of legal rights articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the corporation – with management and the corporate entity at the top. Correspondingly, UK and US corporate law has evolved an institutional and legal architecture that reinforces this hierarchy and domination. It must therefore be acknowledged that it is unrealistic to expect that shareholder empowerment, even if it is assumed for the sake of argument that investors might readily eschew short-termism or rational apathy, can in fact have anything other than a negligible effect on corporate governance.

---

116 A. Gramsci, *Selections from the Prison Notebooks*, edited and translated by Quintin Hoare and Geoffrey Nowell-Smith (International Publishers 1971), at pp. 195-96 and 246-247.

6. Conclusion

A central and controversial debate in contemporary corporate law scholarship concerns the manner in which power should be allocated between directors and shareholders in large corporations with widely dispersed ownership. In conceptualising the problem and constructing solutions, intellectual thought seems to be locked into the theories and ideas that focus our attention on a false reading of history. The arguments presented in much of the classical corporate legal scholarship rest on the basic assumption that UK and US corporate law manifests deliberate as well as inadvertent policy choices in favour of eviscerating legal rights for shareholders. A contentious inference that can be drawn from Berle's and Means' separation of ownership from control thesis is that the great legal freedom of shareholders to organise their own affairs in early corporations has been abrogated by mandatory statute law. This collective view would have it that the shareholders who once owned the corporation controlled it, but due to changes in facultative structures in corporate law, this utopia ended. This article argues that the consensus narrative is a misstatement of the legal position and, to an extent, the factual reality. Instead, these legal rights to protect shareholders from managerial discretion have not eroded but remained constant and unchanged – 'crude, imprecise, and fragile'.[117] The vacuous character of legal rights and of rights discourse is itself complicit in allowing the institutional order to define the terms of the power dynamic, rather than functioning as a form of resistance to oppression and the abuse of such power. This is 'part and parcel of the genius of capitalism'.[118] To suggest that shareholder rights over the course of corporate law history have been anything other than empty constructs is an illusory conclusion to reach.

---

[117] Kahan and Rock, *supra* n. 5, at p. 1279.

[118] Former US Treasury Secretary Paul O'Neill on the issue of Enron's failure.